STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Level 3 Communications, L.L.C.	)	
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	)	**04 - 0428**
Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and the Applicable State Laws For Rates, Terms, and Conditions of Interconnection with Illinois Bell Telephone Company (SBC Illinois)	)	

STAFF OF THE ILLINOIS COMMERCE COMMISSION'S INITIAL BRIEF

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INITIAL BRIEF

The Staff of the Illinois Commerce Commission ("Staff"), by and through its counsel, and pursuant to Section 761.400 of the Commission's Rules of Practice (83 Ill. Adm. Code 761.400), respectfully submits its Initial Brief in the above-captioned matter.

I. INTRODUCTION

On June 8, 2004, Level 3 Communications, LLC (hereafter "Level 3") filed its Petition For Arbitration, seeking Commission arbitration of terms and conditions in dispute between it and the Illinois Bell Telephone Company (hereafter "SBCI"), resulting from the two carriers' attempts to conclude a negotiated interconnection agreement under Section 252 of the federal Telecommunications Act of 1996. *See Petition for Arbitration*, In the Matter of Level 3 Communications, LLC's Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and the Applicable State Laws for Rates, Terms, and Conditions of Interconnection with Illinois Bell Telephone Company d/b/a SBC Illinois,

ICC Docket No. 04-0428 (filed June 8, 2004). On July 6, 2004, SBCI filed its response to the Petition, pursuant to a schedule set by the Administrative Law Judge (hereafter "ALJ") on June 17, 2004. *See* SBC Illinois' Response to Petition for Arbitration; *see also* ALJ Ex. 1 Revised. On August 18, 2004, post-petition negotiation between Level 3 and SBCI having proven constructive, the carriers filed a revised Joint Revised Disputed Points List. *See* Joint Revised Disputed Points List. The Joint Revised Disputed Points List (hereafter "JRDPL"), as thereafter revised,[1] sets forth the issues upon which the parties seek Commission arbitration.

On September 3, 2004, Level 3 pre-filed its direct testimony. Level 3 Ex. 1 through 5. On September 21, 2004, SBCI filed its direct testimony. SBCI Ex. 1.0 through 11.0. Staff filed its Verified Statements on October 5, 2004. Staff Ex. 1.0 – 2.0. Finally, SBCI filed its Supplemental Testimony on October 14, 2004. SBCI Ex. 1.1, 4.1, 5.1, 6.1, 7.1. Level 3 elected not to file supplemental testimony. Tr. 83.

The ALJ twice directed the parties to file disputed fact lists. *See* ALJ Ex. 1 (revised); ALJ Notice of September 10, 2004. These disputed fact lists were to constitute the facts actually in dispute for purposes of cross-examination at hearing, with cross-examination barred on those factual matters not included on one or more of the parties' lists. ALJ Notice of September 10, 2004; Tr. 24 – 33. On October 14, 2004, SBCI, Level 3, and the Staff filed their disputed fact lists. On October 15, the ALJ determined that cross-examination was to be confined to the Staff and SBC lists, the Level 3 list being in his view defective. Tr. 87, *et seq*.

[1] To their credit, the parties continued to negotiate and resolve issues through the time that this matter proceeded to evidentiary hearing. The parties further revised their Joint Disputed Points List on August 30, 2004.

Evidentiary hearings were convened on October 18-20, 2004, and testimony taken and evidence adduced. Tr. 121-328. Thereupon, the matter was continued to December 16, 2004 for such further argument as the ALJ might request, and for clarification on such points upon which he might seek such clarification. Tr. 328.

Disputed Points List

It is the Staff's understanding that the Revised Joint Disputed Points List ("DPL") filed October 19, 2004, brings the DPL up to date, and that these documents state the issues presented for arbitration, as well as each carrier's proposed contract provisions with respect to each disputed point. Accordingly, the Staff has used this list in preparation of this brief.

II. ISSUES PRESENTED FOR ARBITRATION

In their collective DPL submissions, the parties have presented approximately 98 issues for arbitration. Of these issues, the Staff addresses 28. Its position with respect to each is as follows:

Issues GT&C 6 & 7

GT&Cs Issues 6 and 7 address the issue of disconnection of services for nonpayment of undisputed charges between the parties. According to both Level 3 and SBC, the issue in GT&C 6, as enumerated in Section 8.8.1 of the Agreement, is under what circumstances may SBC disconnect services for nonpayment.[2] Also, Issue GT&C 7, as enumerated in Section 9.2 of the Agreement, contains a more detailed description of what products and services could be disconnected under the Agreement for Level 3's failure to pay undisputed charges. In essence, in the event that Level 3 fails to pay its

[2] See Level 3 – SBC 13State – DPL - General Terms and Conditions – GT&C 6, pp. 5-6.

bills, what process and procedure should SBC undertake to disconnect services it offers to Level 3, and what products and services could SBC disconnect?

The Staff recommends that the Commission accept SBC's position, modified to accommodate certain concerns of Level 3 regarding the services that could be disconnected in an instance when Level 3 either fails or refuses to pay an undisputed amount. Staff Ex. 2.0 (Omoniyi), at 11. The Staff further recommends SBC should have the right to disconnect service, but with some well-defined guidelines for such a bill collection processes. *Id*., at 11-12. The Staff recommends that the collection process should include at least the following two steps:

1. SBC should provide Level 3 adequate notice in writing regarding the bill in question by forwarding the bill to an appropriate official designated by Level 3. Currently, SBC proposed sending two notices of disconnection for undisputed and unpaid charges but without specifying when it would be done. SBC should clarify how those notices would be sent to Level 3 and the applicable time interval for each notice.

2. SBC's notice to Level 3 should contain a specific deadline for disconnection of service to Level 3 if payment, in a specified amount, is not forthcoming, and should identify the service(s) that SBC will disconnect.

Id.

The Staff recommends creating a disconnection process that is a blend of the parties' positions, for the following reasons. Staff Ex. 2.0 (Omoniyi), at 12. First, SBC's concern that Level 3 should either dispute a bill or pay it is a reasonable request. *Id*. There is nothing unusual about such a position and it is a common commercial practice that payment would be made for services, unless the paying party disputes the bill. Second, SBC indicated that there would be no disconnection of service in the event that a bill is disputed. *Id*., at 12-13. A third reason is Level 3's concern that SBC may simply

disconnect any or all service to Level 3's end users. *Id*., at 13. SBC's proposal ultimately seems to grant SBC the unilateral authority to decide which services of Level 3 that could be subject to disconnection in the event of nonpayment. The Staff recommends that SBC should not be allowed to disconnect any and all services; in particular, SBC should not disconnect those services paid by Level 3. A result contrary to this recommendation is likely to engender confusion between the parties and also severely affect Level 3 end-users (or end users of those carriers to which Level 3 might sell services), who have nothing to do with the bill payment problem between the two carriers. *Id*. Thus, the public interest in maintaining uninterrupted service to end-users should take precedence in the consideration of this issue.

On the other hand, an equally important concern for the Staff is SBC's fear that Level 3 could avoid payment and disconnection in perpetuity. Staff Ex. 2.0 (Omoniyi), at 13. This could occur if Level 3, for example, moves its UNE lines that are not paid for, to resale service. This potential problem could be addressed by specifically forestalling migration of services that are not paid for to paid-for services. Id., at 13-14. For example, SBC should be able to bar Level 3 from moving its UNE lines that are not paid for to resale. *Id*., at 14. This proposal should be more than adequate to address any attempt by a CLEC, or Level 3 in the instant case, to engage in evasive practices in which undisputed bills are not paid and yet SBC would be unable to disconnect such services of Level 3. Therefore, rather than allow large-scale and generalized disconnection of service, which could affect both paid and unpaid services of Level 3, a targeted solution which affects only the unpaid services is a better solution.

The Staff recommends that SBC's proposal regarding the right to disconnect for products and services after two written notices have been given to Level 3 should be adopted. Staff Ex. 2.0 (Omoniyi), at 14. The Staff also recommends that the word "shall" as proposed by SBC should be adopted to provide both parties certainty on the consequences of undisputed charges. *Id*. In contrast, any provision that states that the disconnection "may" be undertaken for undisputed bill would likely lead to confusion and disagreement on the issue of when, how and what disconnection should be done between the parties. Finally, Level 3's concern that it should not lose its entire customer base as a result of SBC's unilateral and potentially arbitrary disconnection is valid and should be taken into account. *Id*., at 15. Therefore, the Staff recommends that any disconnection be specific and limited in scope to the products and services for which Level 3 has not paid and has not disputed the charges, after two reasonable written notices from SBC at well-defined intervals.

Issues PC-1 and VC-1

The issues in both PC-1 (Terms and Conditions Governing Physical Collocation) and VC-1 (Terms and Conditions Governing Virtual Collocation) are identical. According to the parties, the issue is whether the relevant Physical Collocation Appendix and Virtual Collocation Appendices should comprise the sole and exclusive terms and conditions governing physical and virtual collocation, respectively; or whether Level 3 should be permitted to order collocation products and services both from the relevant Appendix and from the existing state tariff.[3] In essence, should Level 3 be

[3] See Level 3-SBC 13 State –DPL – Physical Collocation, PC-1, at 1-2. and Level 3-SBC State –DPL-Virtual Collocation, VC-1, at 1-2.

allowed, "to 'pick and choose' rates, terms and conditions from either its interconnection agreement with SBC, or from a state tariffs"?[4]

The Staff recommends that the Commission adopt SBC's proposals with some modifications to address certain Level 3 concerns. Staff Ex. 2.0 (Omoniyi), at 20. The Staff's recommendation is based on the following two reasons. First, SBC's proposal that "starting on the Effective Date of this Agreement," SBC will honor "any existing Section 251(c)(6) physical collocation arrangements that were provided under tariff prior to the effective date at the prices that apply under this Agreement." Thus, Level 3's concerns regarding its ability to "pick and choose" are overstated; its ability to pick and choose existing rates, terms and conditions is already available and included under SBC's proposed language. *Id*.

Second, these parties seem to focus their attention in part on an issue that does not apply to the arbitration of an interconnection agreement. Staff Ex. 2.0 (Omoniyi), at 20. Section 252(i) of the Telecommunications Act of 1996 ("TA 96") appears to apply only to situations where a CLEC wants to adopt an existing interconnection agreement under which another CLEC currently operates, the so-called, "opt-in rule." *Id*. Level 3's proposal does not appear to be an opt-in situation; rather, the issue is whether Level 3 should be allowed to buy from the state tariff after this interconnection agreement has become effective, in spite of the fact that Level 3 has an existing interconnection agreement, the terms and conditions of which govern the purchase of the services it seeks to purchase under the tariff. *Id*. Although SBC termed this as a "pick-and-choose" situation, this is a misnomer. However, it appears the parties do not address a

[4] SBC Ex. 5.0 at 3.

situation where the rates, terms and conditions of this Agreement may be superseded by an SBC tariff. Neither the contract provisions proposed by SBC or Level 3 contemplate this occurrence. Since they do not address this issue, the Staff recommends that SBC and Level 3 should only be permitted to order from an effective SBC tariff if the instant agreement does not address the products or services Level 3 seeks to purchase out of the tariff. *Id*. This should satisfy SBC's concern that the Level 3 proposal could lead to administrative confusion and burden SBC's business. *Id.*, at 21-22.

Issues PC-2 and VC-2

The issue in both PC-2 and VC-2 are identical. According to the parties, the issue is whether Level 3 should be permitted to collocate equipment that SBC has determined is not "necessary for interconnection or access to UNEs" or does not meet minimum safety standards?[5] In this instance, the parties were referring to the term "necessary for interconnection or access to UNEs" as used in Section 251(c)(6).

The Staff recommends that SBC's proposals be adopted, with some modifications to address certain Level 3 concerns, for the following reasons.[6] Staff Ex. 2.0 (Omoniyi), at 25. First, the issue of placement of collocation equipment requires that the parties take into account the safety of not only the equipment of Level 3 and SBC, but also the safety of the entire network, which includes the equipment of all carriers. It is also a public interest issue as any threat to the network threatens service

[5] See Level 3-SBC 13 State –DPL – Physical Collocation, PC-2, at 2-3 and Level 3-SBC State –DPL-Virtual Collocation, VC-2, at 2-3.

[6] The Staff notes that the parties did not address the term of art "necessary" but instead focused on the issue of equipment safety. The Staff's recommendation, consequently, will address the issue of equipment and how that should be the focus of whether a collocation equipment should be allowed or not.

to all the end users. *Id*., at 26. Accordingly, the Staff finds it reasonable to turn down collocation requests for equipment that fail to meet the minimum safety standards. *Id*.

Second, a period of ten (10) business days, which SBC proposes, seems to be a reasonable notice period to resolve any issues of equipment collocation. Staff Ex. 2.0 (Omoniyi), at 26. Also, it appears that Level 3 has an additional means of collocation dispute resolution, as it may appeal to the Commission if any discussion between SBC and Level 3 fails to resolve the dispute. See the General Dispute Resolution provisions of General Terms and Conditions, Section 10. Thus, this provision should help eliminate any Level 3 concerns that a dispute could remain in limbo for an extended period of time. *Id*., at 26-27.

Third, the proposal by SBC that Level 3 should incur the cost of removal and resulting damages if the non-compliant equipment was already collocated is reasonable as it would be unfair to require SBC to bear the cost of such removal and any resulting damage. Staff Ex. 2.0 (Omoniyi), at 27. Finally, in order to avoid this type of problem in the first place, SBC should make its list of equipment that meets its collocation requirements known to Level 3 as soon as there is a request for collocation of equipment from Level 3. *Id*. This would save both parties time in either avoiding the placement of non-compliant equipment in a collocation cage or resolution of any disagreement prior to collocation of non-compliant equipment by error. *Id.* This step is also in the public interest as it is likely to prevent damages to the entire network that may affect other carriers in the entire network. *Id*.

Issue IC – 1

The Appendix Intercarrier Compensation "sets forth the terms and conditions for Intercarrier Compensation of intercarrier telecommunications traffic between" SBC and Level 3.[7] The parties offer competing proposals to classify traffic [as if "jurisdictionally"] for purposes of intercarrier compensation.

The utility of these classifications will depend on how well the distinctions in traffic established in these classifications match the distinctions in compensation levels appropriate for the respective traffic types.

Level 3's proposed classifications do not closely track distinctions in intercarrier compensation that have been identified in the agreed language between the parties or in Commission or FCC rules, regulations, or decisions. Accordingly, the Staff recommends the Commission reject them.

SBC, however, offers classifications based upon traffic definitions contained in agreed language between the parties and various Commission and FCC intercarrier compensation orders. In the Appendix Intercarrier Compensation, the parties have agreed to identify for separate intercarrier compensation treatment, the following categories of intercarrier traffic: Optional EAS Traffic[8], IntraLATA Toll Traffic,[9] and Meet Point Billing Traffic.[10] In addition, the FCC and Commission have intercarrier compensation rules and regulations, or have made determinations regarding intercarrier compensation, that result in separate intercarrier compensation rates for Section 251(b)(5) traffic[11], FX Traffic,[12] ISP-bound traffic,[13] and interLATA toll traffic,[14]

[7] Appendix Intercarrier Compensation, Section 1.1.

[8] Appendix Intercarrier Compensation, Section 8.

[9] Appendix Intercarrier Compensation, Section 14.

[10] Appendix Intercarrier Compensation, Section 12.

[11] 47 C.F.R. § 51, Subpart H - Reciprocal Compensation for Transport and Termination of

respectively. Thus, the traffic distinctions proposed by SBC track very closely the distinctions in compensation levels appropriate for the respective traffic types.

SBC's classification proposal does, however, fail to distinguish one form of traffic that is receiving specific and unique treatment under reciprocal compensation rules and regulations from the FCC -- IP-PSTN traffic. On November 9, 2004 the FCC voted "that [it, the FCC], not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to IP-enabled services."[15] In particular, the FCC specifically indicated that it would address intercarrier compensation as it applies to IP-enabled traffic in its pending IP-enabled services proceeding.[16] Thus, the FCC is addressing recriprocal compensation for IP-enabled services specifically and separately from other types of traffic. Thus, Staff recommends the Commission accept SBC's proposed language for Appendix Intercarrier Compensation Section 3.1 with one modification. Staff recommends the Commission require the parties to insert one additional classification into this language – an IP-PSTN VoIP traffic classification. This will simply identify that IP-PSTN VoIP traffic is not, at this time, subject to the intercarrier compensation provisions applicable to any of the other classes of traffic in this contract. Of course, adding this class does not prevent the FCC from prescribing intercarrier compensation rules for IP-PSTN VoIP traffic that match intercarrier compensation rules

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Telecommunications Traffic and FCC, Order on Remand and Report and Order, CC Docket Nos. 96-98 and 99-68, Released April 27, 2001.

[12] Commission Order in Docket No. 03-0329 at 120 and 123-124.

[13] FCC, Order on Remand and Report and Order, CC Docket Nos. 96-98 and 99-68, Released April 27, 2001 and Commission Order in Docket No. 03-0329 at 120.

[14] 47 C.F.R. § 69 and Commission Order in Docket Nos. 97-0601, 97-0602, and 97-0516 (Consolidated).

[15] FCC Press Release, entitled "FCC Finds That Vonage Not Subject To Patchwork Of State Regulations Governing Telephone Companies", issued On November 9, 2004 ("FCC Vonage Press Release").

[16] FCC Vonage Press Release.

applicable to other proposed SBC classes of traffic, or from determining that existing rules for such traffic apply to IP-PSTN VoIP traffic. Adding this class does, however, permit the FCC to prescribe separate and distinct rules for IP-PSTN VoIP traffic. Thus, with Staff's proposed modification, the distinctions in traffic identified by these classifications will be driven and, more importantly, will not drive differences in compensation levels appropriate for the respective traffic types.

Issue IC – 2

The threshold question with respect to Issue IC-2 is whether or not the Commission should, in this arbitration, determine rates, terms, and conditions specifically applicable to the exchange of IP-PSTN "VoIP" traffic. The answer is unequivocally no.

Level 3 has a pending forbearance petition before the FCC that must, according to federal statute, be decided by March 22, 2004.[17] The IP-PSTN issues in this proceeding, including Issue IC-2, require the Commission to determine the proper application of FCC rules and regulations, the same issues placed before the FCC in the pending forbearance petition. Thus, the determinations by the FCC in response to Level 3's petition will determine the IP-PSTN "VoIP" issues presented by the parties to the Commission in this proceeding.[18] And, even if the Commission were inclined to establish rules in the interim, the FCC has preempted it from doing so. [19]

Staff recommends the Commission affirmatively decide not to resolve IP-PSTN "VoIP" issues in this proceeding. In order to implement this decision Staff recommends

[17] FCC, Order, WC Docket No. 03-266, Released October 21, 2004, at ¶ 5.

[18] Staff Exhibit 1.0 at 5-6.

[19] FCC Vonage Press Release.

that the Commission reject Level 3's proposed language for Appendix Intercarrier Compensation Section 3.2. SBC's proposed language for 16.1 should be accepted, but should revised to specifically indicate that it does not apply to IP-PSTN "VoIP" traffic. If Staff's recommendation regarding this threshold issue is accepted then the Commission would not be required to address any of the subissues presented by Level 3 or SBC within the framing of Issue IC-2. In accepting this recommendation, the Commission should clarify that it is specifically declining to make a determination regarding the rates, terms, and conditions for the exchange of IP-PSTN VoIP traffic in this proceeding. Specifically the Commission should clearly state that the absence of inclusion of IP-PSTN VoIP traffic from any section of the Appendix Intercarrier Compensation means that such traffic is not, because of any arbitration decision made in this proceeding by the Commission, subject to rates, terms, and conditions contained therein. If and when the FCC makes a determination regarding intercarrier compensation for IP-PSTN traffic, the parties can, if appropriate, update the agreement to reflect such determinations.

Issue IC - 3

Here again, the parties offer competing proposals to classify traffic for purposes of intercarrier compensation. Again, as indicated above, the utility of these classifications will depend on how well the distinctions in traffic identified by these classifications match the distinctions in compensation levels appropriate for the respective traffic types.

In this instance, the fundamental dispute is whether Section 251(b)(5) traffic should be defined according to the geographic location of the calling and called parties, or, alternatively, based upon the calling and called parties phone numbers – in essence

whether VNXX or FX-like traffic should be classified separately from Section 251(b)(5) traffic. As noted above, the Commission has consistently distinguished Section 251(b)(5) traffic from VNXX or FX-like traffic.[20] As a classification matter, separately classifying Section 251(b)(5) and VNXX or FX-like traffic does not prevent either the Commission or the FCC from prescribing intercarrier compensation rules for VNXX or FX-like traffic that are similar or identical to intercarrier compensation rules applicable Section 251(b)(5) traffic. Adding this distinction does, however, permit either the Commission or FCC to prescribe separate and distinct rules for VNXX or FX-like and 251(b)(5) traffic. Adding the distinction (along with a specific VNXX or FX-like passage as proposed by SBC with respect to Issue IC-11) identifies -- explicitly rather than implicitly -- the appropriate intercarrier compensation rates applicable to VNXX or FX-like traffic.

Thus, Staff recommends the Commission accept SBC's proposed language for Appendix Intercarrier Compensation Section 3.2.

Issue IC - 4

With respect to this Issue, Level 3 proposes language that would address proper routing and dispute resolution as its relates to IP-PSTN "VoIP" traffic. Level 3's recommended language with respect to IP-PSTN "VoIP" traffic should be rejected for the reasons explained in Issue IC – 2.

SBC offers a more generic proposal that would require the parties to work cooperatively to address instances in which traffic is being routed improperly according to the terms of the contract as a result of improper routing to either Level 3 or SBC by a

[20] Commission Order in Docket No. 03-0329 at 123-124.

third party. This would correct, for example, instances in which third parties improperly identify circuit switched interstate interexchange voice traffic delivered to Level 3 and bound for SBC as local traffic rather than switched access traffic.

Level 3's primary objection to this proposal is that it might prohibit the exchange of IP-enabled traffic. However, as explained above, the Commission should not address issues related to IP-PSTN VoIP traffic. Accordingly, Level 3's proposal can be remedied by requiring the parties to include language indicating that the Section 16.2 does not apply to the exchange of IP-PSTN VoIP traffic.

SBC's proposed language for Appendix Intercarrier Compensation Section 16.2 offers a reasonable approach to general traffic identification problems. Staff, therefore, recommends that SBC's proposed language be accepted, but modified to specify that it does not address IP-PSTN "VoIP" traffic. This recommendation more directly remedies the concerns expressed by Level 3 than does the proposal of Level 3.

Issue IC – 5

Here again the parties offer competing proposals to classify traffic for purposes of intercarrier compensation. Again, as indicated above the utility of these classifications will depend on how well the distinctions in traffic identified by these classifications match the distinctions in compensation levels appropriate for the respective traffic types.

In this instance, the fundamental dispute is whether ISP-bound traffic should be defined according to the geographic location of the calling and called parties rather than based upon the calling and called parties phone numbers – in essence whether VNXX or FX-like ISP-bound traffic should be classified separately from ISP-bound traffic. As observed above, the Commission has distinguished between ISP-bound and VNXX or

FX-like ISP-bound traffic.[21] As a classification matter, separately classifying ISP-bound and VNXX or FX-like ISP-bound traffic does not prevent either the Commission or the FCC from proscribing intercarrier compensation rules for VNXX or FX-like ISP-bound traffic that match intercarrier compensation rules applicable to ISP-bound traffic. Adding this distinction does, however, permit either the Commission or FCC to prescribe separate and distinct rules for VNXX or FX-like ISP-bound traffic and ISP-bound traffic. Adding the distinction (along with a specific VNXX or FX-like passage as proposed by SBC with respect to Issue IC-11) also identifies -- explicitly rather than implicitly -- the appropriate intercarrier compensation rates applicable to VNXX or FX-like ISP-bound traffic.

Alternatively, Level 3 offers a definition of ISP-bound traffic that would encompass such traffic as "local" ISP-bound traffic, "VNXX or FX-like" ISP-bound traffic, and interexchange traffic delivered through IXCs bound for an ISP. This classification is overly broad. For example, it does not reflect differences in traffic that result from differences in intercarrier compensation rates that the Commission has deemed applicable to the respective traffic in past decisions.

Thus, Staff recommends the Commission accept SBC's proposed language for Appendix Intercarrier Compensation Section 3.3.

Issue IC – 6

It is not clear that this is an Illinois issue. Both parties include language that appears responsive to a dispute between Level 3 and SBC in Connecticut. The only disputed language that does not appear Connecticut-specific is contained in the first

[21] Commission Order in Docket No. 03-0329 at 120.

sentence of Appendix Intercarrier Compensation Section 3.6. With respect to this passage, the parties agree to language that would require the party that originates traffic for an end user to pay the party that terminates the traffic for an end user for transport and termination. The parties disagree on whether this provision should apply to Section 251(b)(5) traffic and ISP-bound traffic as proposed by SBC or to circuit switched traffic as proposed by Level 3.

As with many previous issues, resolution of this issue depends on which classification of traffic better reflects differences in intercarrrier compensation treatment for such traffic. In this regard, Level 3's proposal is overly restrictive. For example, the party that originates traffic for an end user must pay the party that terminates the traffic for an end user for transport and termination charges even if the traffic is originated and terminated as a PSTN call, but contains IP routing in the middle.[22] The parties appear to be in agreement on this point. However, Level 3's proposed language, which restricts focus of these provisions to circuit switched traffic, would render such agreed upon provisions inapplicable to IP in the middle circumstances.

Alternatively, SBC's proposal is potentially overbroad in that it could be read to include IP-PSTN traffic as subject to the requirements of Appendix Intercarrier Compensation, Section 3.6. However, if the Commission accepts Staff's recommendation with respect to Issue IC-1, then IP-PSTN VoIP traffic will be classified separate and apart from 251(b)(5) and ISP-bound traffic. Staff, therefore, recommends that the Commission, conditional on its acceptance of Staff's recommendation for Issue

[22] See, FCC, Order, In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges (AT&T Order), WC Docket No. 03-361, Released April 21, 2004.

IC-1, accept SBC's proposed language for Appendix Intercarrier Compensation, Section 3.6.

Issue IC – 10

All of the sub-issues raised by the parties with respect to this issue center around the appropriate intercarrier compensation rates for Section 251(b)(5) and ISP-bound traffic.

As a threshold matter, Level 3 appears to question whether intercarrier compensation determinations should be made based upon past agreements between the parties or whether they should be made based upon current FCC intercarrier compensation rules.

First, Level 3 intimates that it wants the Commission to defer this decision, and indeed, to preempt itself. Level 3 witness William P. Hunt III gives it as his opinion that the entire matter is one that both SBC and Level 3 agree to be beyond Commission jurisdiction. *See* Level 3 Ex. 1.0 (Hunt) at 66 (Both carriers allegedly agree that IP-enabled services are interstate in character). However, Mr. Hunt further contends the Commission should "avoid any major changes to the current compensation regime for ISP bound traffic[.]" Level 3 Ex. 1.0 (Hunt) at 30. This barrier notwithstanding, Level 3 urges the Commission to adopt "the current compensation regime for ISP bound traffic that is in place between Level 3 and SBC", Id. Level 3 does not go so far as to suggest what the current scheme actually is, or upon what, if any, FCC rules or orders it is based. Level 3 intimates that the existing rate structure is .0005¢ per minute of use "for the exchange of all traffic[.]"[23] Id. at 62. This appears to be a reciprocal compensation

[23] Notwithstanding this, Mr. Hunt states that Level 3 will, when acting as an interexchange carrier,

rate, Id.; Level 3's proposed contract language indicates that the rate should be "$0.0005 per minute of use or at the state approved local compensation rates to terminate IP-enabled services traffic to either Party's end user customer." Joint Disputed Points List, Appendix Intercarrier Compensation Section 3.2.3.1.

The Commission should, where the FCC has existing and explicitly defined rules governing the compensation of exchanged traffic, make its determinations based on existing intercarrier compensation rules.

Unlike the IP-PSTN VoIP traffic issues addressed above, the FCC has current and effective rules explicitly addressing intercarrier compensation for both Section 251(b)(5) and ISP-bound traffic. These rules are found, among other places, in the Commission's *ISP-Bound Traffic Order*. *See, generally, Order on Remand and Report and Order*, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 / Intercarrier Compensation for ISP-Bound Traffic, FCC No. 01-131, CC Docket No. 96-98; 99-68 (April 27, 2001)(hereafter "ISP-Bound Traffic Order"). Also, the parties currently exchange Section 251(b)(5) and ISP-bound traffic, which cannot be said for IP-PSTN VoIP traffic. Tr. at 169, 240, and 256. Finally, unlike the IP-PSTN VoIP traffic issues above, the FCC has no statutory deadline for implementing any revisions to its existing rules that might arise from its general intercarrier compensation docket.[24] Thus, unlike the IP-PSTN VoIP issues addressed

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"pay access charges for traditional circuit-switched phone-to-phone InterLATA traffic." Level 3 Ex. 1.0 (Hunt) at 45. This rate, approximately $0.0123, is obvious far higher than Level 3's proposal. Staff Ex. 1.0 (Zolnierek) at 11.

[24] Notably, Level 3's expressed expectation that the FCC would replace its existing rules by October 2004 through a new ISP-Bound Traffic Order have not been realized. See DPL – Intercarrier Compensation, Issue No. IC-13. The FCC has, however, acted upon the Core Forbearance Petiton. Staff's recommendation are based upon the FCC's existing rules and regulations including those included in the FCC's Order in the Core Forbearance proceeding.

above the Commission can look to explicit FCC rules for resolution of intercarrier compensation issues regarding Section 251(b)(5) and ISP-bound traffic.

Level 3 objects to SBC's Proposal to use the term "Section 251(b)(5) Traffic" in Appendix Intercarrier Compensation, Section 5, arguing that this term is something SBC created out of whole cloth. Level 3 – SBC 13State – DPL – Intercarrier Compensation, Issue No. IC – 10. It is not. The FCC uses this term repeatedly in *ISP-Bound Traffic Order*. *See* ISP-Bound Traffic Order, ¶¶ 8, 25, 89, 98. Indeed, in the *ISP-Bound Traffic Order*, the FCC abandoned its official definition of "local traffic", citing unnecessary ambiguities created by the term "local traffic", and characterized traffic that is subject to reciprocal compensation under Section 251(b)(5) as "251(b)(5) traffic". ISP-Bound Traffic Order, ¶¶34-41. Thus, the jurisdictional definition "251(b)(5) traffic" is certainly not a new creation – it finds its origin in the *ISP-Bound Traffic Order*, which establishes the rules governing intercarrier compensation rates for such traffic. In addition, as explained above, traffic subject to Section 251(b)(5) has, for purposes of intercarrier compensation, been treated differently from other types of traffic, including ISP-bound traffic. Thus, Staff recommends the Commission accept SBC's proposal to reference the term "Section 251(b)(5) Traffic" in Appendix Intercarrier Compensation, Section 5.

Level 3 recommends the parties continue forward with their existing contract rates for Section 251(b)(5) traffic and ISP-bound traffic --- a rate of $0.0005 per minute of use. Level 3 Ex. 1.0 (Hunt) at 62. Level 3's position with respect to this issue is decidedly unclear. As explained above, Level 3 appears to propose that the Commission ignore existing intercarrier compensation rules and instead simply carry forward existing intercarrier compensation rates contained in the parties' existing

contract. Even if Staff misapprehends Level 3's position, and Level 3 is not recommending that the Commission ignore existing intercarrier compensation rules, Level 3 has not explained how its proposal complies with the *ISP-Bound Traffic Order*.

Level 3's failure to explain the interaction between its proposal and the *ISP-Bound Traffic Order* adds general uncertainty to resolution of this issue. For example, under the *ISP-Bound Traffic Order*, SBC is entitled to, and has in fact elected to, invoke FCC-defined rate caps for the exchange of ISP-bound traffic. ISP-Bound Traffic Order at ¶ 89 and ILL.C.C. No. 20, Part 23, Section 2, 5th Revised Sheet No. 3. n. 1. In making this election, SBC is required to offer to exchange Section 251(b)(5) traffic at the same rates that apply for the exchange of ISP-bound traffic. ISP-Bound Traffic Order at ¶ 89. Thus, with respect to the FCC's framework the ball is in Level 3's court. That is, the FCC rules require SBC and Level 3 to exchange Section 251(b)(5) traffic at the same rate as ISP-bound traffic *if* Level 3 elects to do so. However, Level 3 has not indicated in this proceeding, and presumably has not indicated to SBC, whether or not it wants to elect the ISP-bound rates for 251(b)(5) traffic. Like SBC, Staff is left to assume that Level 3 prefers the rates to be the same because the rates in the existing contract between to the two carriers are the same.

Staff will assume that Level 3 prefers to exchange both Section 251(b)(5) and ISP-bound traffic at the same rate, inasmuch as Mr. Hunt's testimony states with approval that the FCC is moving towards such a regime. Level 3 Ex. 1.0 (Hunt) at 30-31. In essence, Staff is assuming that if the Commission rejects Level 3's proposal to establish a rate of $0.0005 for both Section 251(b)(5) and ISP-bound traffic, and instead orders the parties to exchange ISP-bound traffic at a rate of $0.0007, Level 3 would

prefer to exchange Section 251(b)(5) traffic at a rate of $0.0007, rather than at the intercarrier compensation rates contained in SBC's existing Illinois tariffs, or at some other rates (such as the bifurcated rates contained in SBC's alternative proposals). In the event that Level 3 fails to confirm Staff's assumption, Staff recommends the Commission order the parties to adopt a uniform rates for Section 251(b)(5) and ISP-bound traffic. The FCC has expressed a clear policy of seeking to unify intercarrier compensation rates, *see Order*, ¶2, Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the *ISP Remand Order*, FCC No. 04-241; WC Docket No. 03-171 (rel. October 18, 2004) (hereafter "Core Forbearance Order") ("The Commission [is] particularly interested in identifying a unified approach to intercarrier compensation that would apply to all types of traffic and to interconnection arrangements between all types of carriers"), and Staff recommends the Commission follow that policy here to the extent it can within the boundaries of current federal and state law.

Under a unified compensation regime, the disputes with respect to this issue can be greatly simplified. That is, all sub-issues concerning rate structure issues (i.e., SBC Issues 10c, 10d, and 10e) become moot. The primary issue here simplifies to whether the parties should exchange both Section 251(b)(5) and ISP-bound traffic at a rate of $0.0007 per minute of use, or whether the parties should exchange both Section 251(b)(5) and ISP-bound traffic at a rate of $0.0005.

Staff recommends that the Commission accept Level 3's proposed rate of $0.0005. First, $0.0005 is clearly below the rate cap of $0.0007 established by the FCC and is therefore consistent with the FCC rules. Second, the FCC states:

> Because the transitional rates are caps on intercarrier compensation, they have no effect to the extent that states have ordered LECs to exchange ISP-bound traffic either at rates below the caps or on a bill and keep basis (or otherwise have not required payment of compensation for this traffic). The rate caps are designed to provide a transition toward bill and keep, and no transition is necessary for carriers already exchanging traffic at rates below the caps.
>
> *ISP-Bound Traffic Order*, ¶8.

The rate of $0.0005 per minute of use is the existing rate at which the Commission has authorized the parties to exchange such traffic and is a rate closer to bill and keep than $0.0007. Order in Docket No. 03-0392. Therefore, a rate of $0.0005 is not only consistent with the FCC rules and regulations, but also consistent with the policy directives outlined in the *ISP-Bound Traffic Order*.

To implement Staff's recommendation, the Commission need only adopt SBC's proposed language for Appendix Intercarrier Compensation Section 5. In substance, this language serves only to point to SBC's proposed Intercarrier Compensation Section 6, which contains applicable intercarrier compensation rates in the event that SBC elects the FCC rate caps for ISP-bound traffic. However, since SBC has in fact elected the FCC rate caps, this regime would therefore be adopted as a mater of law. Staff notes that its recommendation here is contingent on adoption of its recommendations regarding modification of Section 6 explained below (within Issue IC - 13).

Issue IC – 11

Staff understands the essential dispute with respect to this issue to be whether VNXX or FX-like traffic should be exchanged upon a bill and keep basis or whether instead it should be exchanged at reciprocal compensation rates. This issue has been addressed repeatedly by the Commission and the Commission has

repeatedly determined that bill and keep should apply.[25] Nothing in the record differentiates the situation here from those in which the Commission made its previous determinations and there is nothing that should cause the Commission to alter its previous findings.

The Commission has ordered bill and keep for FX-like or VNXX traffic based on its policy goals of: (1) preserving the consumer benefits that coincide with the use of FX-like or VNXX arrangements[26] and (2) preventing one LEC from subsidizing the FX-like or VNXX like offerings of another LEC.[27] These policy goals are just as appropriate today as they were when the Commission made its previous findings. Furthermore, nothing in the FCC's recently released Core Forbearance Order requires the Commission to alter its previous determinations on these issues.

In the Core Forbearance Proceeding, the FCC revisited its Section 251(b)(5) and ISP-bound traffic intercarrier compensation rules and regulations. Therein, the FCC expressed a policy goal of unifying intercarrier compensation regimes.[28] Based on this policy, the FCC determined that ISP-bound traffic should be subject to a single rate rather than a bifurcated rate depending on whether it is existing vs. new or growth traffic.[29] That is, the FCC reversed its previous determination that would have, for example, resulted in a difference between the intercarrier compensation rate for the first ISP-bound traffic minute exchanged between two parties in a given period and the last ISP-bound traffic minute exchanged between the two parties in the same given period.

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[25] Staff Ex. 1.0 at 19.

[26] Order in Docket No. 03-0329 at 124..

[27] Order on Rehearing in Docket No. 02-0253 at 16 (citations omitted).

[28] Core Forbearance Order at ¶ 23.

[29] Core Forbearance Order at ¶ 24.

Here the circumstances are markedly different. VNXX or FX-like traffic flows from a calling party in one local calling area to a called party in a separate local calling area and thus differs from traffic flowing from a calling party located in one local calling area to a called party located in the same local calling area. Thus, the FCC's Core Forbearance Order does not imply or require that the Commission subject two disparate types of traffic to a single unified rate.

While adopting a unified rate for disparate types of traffic may be a laudable action in the course of reforming the entire system of intercarrier compensation, the Commission is still required to make determinations in the proceeding navigating within a federal structure that subjects traffic to differing intercarrier compensation rates depending upon the jurisdictional nature of the traffic. VNXX or FX-like traffic does not fit neatly into this existing system and consideration of a policy goal of unifying rates does not inform resolution of this problem. The Commission has in the past struck a balance that preserves its policy goals. At this time, under the current federal intercarrier compensation structure, the Commission should maintain that balance as it has in the past.

Similarly, the Commission has also determined previously that bill and keep should apply to ISP-bound VNXX or FX-like traffic.[30] In making this finding the Commission stated:

> In the ISP Remand Order, the FCC stated that where a state commission had instituted a bill and keep arrangement for ISP bound traffic, that arrangement would remain in place. In Illinois, we have repeatedly held that FX-like traffic is not subject to reciprocal compensation, but rather we have instituted a bill and keep regime. In our limited role of upholding

[30] Staff Ex. 1.0 at 20.

> FCC orders concerning ISP bound traffic, we conclude that the ISP bound FX traffic between AT&T and SBC will also be subject to bill and keep. To do otherwise would contradict the FCC's stated policy goals to reduce carriers' reliance on carrier to carrier payments.[31]

Again, nothing in the record differentiates the situation here from those in which the Commission made its previous determinations and there is nothing that should cause the Commission to alter its previous findings.

With respect to any impact as a result of the Core Forbearance Order, Staff notes that VNXX or FX-like ISP-bound traffic flows from a calling party in one local calling area to an ISP in a separate local calling area and is, therefore, similar to VNXX or FX-like traffic, which flows from a calling party in one local calling area to a called party in a separate local calling area. Therefore, adopting a unified rate for these two types of traffic not only comports with previous commission findings but with the actions taken by the FCC in its Core Petition to unify similar traffic types.

SBC's proposed language for Appendix Intercarrier Compensation 7.2 incorporates the Commission's previously ordered treatment of VNXX or FX-like traffic into the agreement. For the above reasons, Staff recommends the Commission adopt SBC's proposed language for Appendix Intercarrier Compensation 7.2.

Issue IC – 13

This issue again focuses on the proper compensation for Section 251(b)(5) and ISP-bound traffic, but extends to implementation issues surrounding the *ISP-Bound Traffic Order*. Again, the Commission should reject any proposal by Level 3 to ignore existing FCC rules regarding intercarrier compensation for this traffic.

[31] Order in Docket No. 03-0239 at 120.

A number of the disputes with respect to this issue have been resolved by The *Core Forbearance Order* resolves a number of matters in dispute here. *See, generally,* Core Forbearance Order. Under the *ISP-Bound Traffic Order*, once the ILEC makes a positive rate cap election, carriers were required to: (1) exchange all *existing* ISP-bound traffic (with some allowance for growth in existing markets) under rates consistent with its ISP-bound traffic rate caps; but (2) exchange all *new growth* (above a specified allowance) and *new market* ISP-Bound traffic on a "bill and keep" basis. ISP-Bound Traffic Order, ¶¶78-85. However, in the *Core Forbearance Order*, the FCC elected, under its Section 10 authority, 47 U.S.C. §160, to forbear from enforcing its new market and growth cap rules for ISP-bound traffic. Core Forbearance Order, ¶¶20-21. Thus, the FCC determined that, once an ILEC has made a positive rate cap election, all ISP-bound traffic including new growth and new market traffic should be exchanged at rates consistent with its ISP bound traffic rate caps, thus abolishing another distinction in rates for ISP-bound traffic created by its *ISP Bound Traffic Order*. *Id*.

As a result of the FCC's recent determinations, the agreement need not provide for the growth caps or new market restrictions that SBC proposes.[32]. Thus, the Commission should decline to incorporate any references to growth caps and new market restrictions, such as those contained in SBC's proposed Appendix Intercarrier Compensation, Section 6.

The *Core Forbearance Order,* because it abolishes the distinction between Section 251(b)(5) and ISP-bound traffic intercarrier compensation rate differences, likewise resolves any dispute regarding measurement and billing of Section 251(b)(5)

[32] To do SBC justice, it advanced these proposals well prior to the FCC's various rulings in this regard.

and intercarrier compensation traffic that is related to SBC's proposed Appendix Intercarrier Compensation, Section 6.7. Staff presumes that since there is no need to distinguish "bill and keep" traffic from traffic subject to reciprocal compensation, there is also no need for Appendix Intercarrier Compensation, Section 6.7 – which -- as Staff's understands the matter -- is proposed only as a means of assigning responsibility for identifying and tracking what was distinctly rated traffic, but which now should be uniformly rated.

This leaves only the question of whether the parties should include language permitting them to challenge the 3:1 ISP-bound traffic ratio contained in the FCC's *ISP-Bound Traffic Order*. *See* ISP-Bound Traffic Order, ¶79 (FCC adopts a rebuttable presumption that traffic delivered to a carrier, pursuant to a particular contract, that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic). Clearly, by establishing the 3:1 ratio as a rebuttable presumption, the *ISP-Bound Traffic Order* contemplates such challenges – a point that Level 3 does not dispute. Accordingly, SBC's proposal should be accepted. Staff notes, that in the event that all Section 251(b)(5) and ISP-bound traffic is exchanged at a uniform rate (as recommended by Staff), there will be no need for the parties to separately identify Section 251(b)(5) and ISP-bound traffic. Therefore, acceptance of SBC's proposal may have no impact on the contract. Alternatively, if Level 3 seeks separate rates for Section 251(b)(5) and ISP-bound traffic, this provision will be relevant. Because of this last possibility Staff recommends retaining the language despite the high probability that it will be rendered irrelevant by other terms and conditions of the contract.

In order to implement Staff's proposal the Commission should order the parties to include SBC's proposed Appendix Intercarrier Compensation, Section 6 in their contract, amended as follows:

6. RATES, TERMS AND CONDITIONS OF FCC'S INTERIM ISP TERMINATING COMPENSATION PLAN

6.1 The Parties hereby agree that the following rates, terms and conditions set forth in Sections 6.2 through ~~6.6~~ 6.3 shall apply to the termination of all Section 251(b)(5) Traffic and all ISP-Bound Traffic exchanged between the Parties in each of the applicable state(s). SBC-13STATE has made an offer as described in Section 5 above effective on the later of (i) the Effective Date of this Agreement and (ii) the effective date of the offer in the particular state ~~and that all ISP-Bound Traffic is subject to the growth caps and new market restrictions stated in Sections 6.3 and 6.4, below~~.

6.2 Intercarrier Compensation for all ISP-Bound Traffic and Section 251(b)(5) traffic

6.2.1 The rates, terms, conditions in Sections 6.2 through ~~6.6~~ 6.3 apply only to the termination of all Section 251(b)(5) Traffic and all ISP-Bound Traffic as defined in Section 3.2 and Section 3.3 above ~~and is subject to the growth caps and new market restrictions stated in Sections 6.3 and 6.4 below~~.

6.2.2 The Parties agree to compensate each other for the transport and termination of all Section 251(b)(5) and ISP-Bound Traffic and traffic on a minute of use basis, at ~~$.0007~~ $0.0005 per minute of use.

6.2.3 Payment of Intercarrier Compensation on ISP-Bound Traffic and Section 251(b)(5) Traffic will not vary according to whether the traffic is routed through a tandem switch or directly to an end office switch.

~~6.3 ISP- Bound Traffic Growth Cap~~

~~6.3.1 On a calendar year basis, as set forth below, the Parties agree to cap overall ISP-Bound Traffic minutes of use based upon the 1st Quarter 2001 ISP minutes for which the LEVEL 3 was entitled to compensation under its Interconnection Agreement(s) in existence for the 1st Quarter of 2001, on the following schedule:~~

~~Calendar Year 2001 1st Quarter 2001 compensable ISP-Bound Traffic minutes, times 4, times 1.10~~

~~*Calendar Year 2002 Year 2001 compensable ISP-Bound Traffic minutes, times 1.10*~~

~~*Calendar Year 2003 Year 2002 compensable ISP-Bound Traffic minutes*~~

~~*Calendar Year 2004 and thereafter Year 2002 compensable ISP-Bound Traffic minutes*~~

~~*6.3.2 Notwithstanding anything contrary herein, in Calendar Year 2004, the Parties agree that ISP-Bound Traffic exchanged between the Parties during the entire period from January 1, 2004 until December 31, 2004 shall be counted towards determining whether LEVEL 3 has exceeded the growth caps for Calendar Year 2004.*~~

~~*6.3.3 ISP-Bound Traffic minutes that exceed the applied growth cap will be Bill and Keep. "Bill and Keep" refers to an arrangement in which neither of two interconnecting parties charges the other for terminating traffic that originates on the other party's network; instead, each Party recovers from its end-users the cost of both originating traffic that it delivers to the other Party and terminating traffic that it receives from the other Party.*~~

~~*6.4 Bill and Keep for ISP-Bound Traffic in New Markets*~~

~~*6.4.1 In the event the Parties have not previously exchanged ISP-Bound Traffic in any one or more LATAs in a particular state prior to April 18, 2001, Bill and Keep will be the reciprocal compensation arrangement for all ISP-Bound Traffic between the Parties for the remaining term of this Agreement in any such LATAs in that state.*~~

~~*6.4.2 In the event the Parties have previously exchanged traffic in a LATA in a particular state prior to April 18, 2001, the Parties agree that they shall only compensate each other for completing ISP-Bound Traffic exchanged in that LATA, and that any ISP-Bound Traffic in other LATAs shall be Bill and Keep for the remaining term of this Agreement.*~~

~~*6.5 Growth Cap and New Market Bill and Keep Arrangements*~~

~~*6.5.1 Wherever Bill and Keep for ISP-Bound traffic is the traffic termination arrangement between the Parties, both Parties shall segregate the Bill and Keep traffic from other compensable traffic either (a) by excluding the Bill and Keep minutes of use from other compensable minutes of use in the monthly billing invoices, or (b) by any other means mutually agreed upon by the Parties.*~~

~~*6.5.2 The Growth Cap and New Market Bill and Keep arrangement applies only to ISP-Bound Traffic, and does not include Optional EAS traffic, Intra LATA Inter exchange traffic, or Inter LATA Inter exchange traffic.*~~

~~*6.6*~~ *6.3 ISP-Bound Traffic Rebuttable Presumption*

~~6.6.1~~ 6.3.1 In accordance with Paragraph 79 of the FCC's ISP Compensation Order, the Parties agree that there is a rebuttable presumption that any of the combined Section 251(b)(5) Traffic and ISP-Bound Traffic exchanged between the Parties exceeding a 3:1 terminating to originating ratio is presumed to be ISP-Bound Traffic ~~subject to the compensation and growth cap terms in this Section 6.3~~. Either Party has the right to rebut the 3:1 ISP-Bound Traffic presumption by identifying the actual ISP-Bound Traffic by any means mutually agreed by the Parties, or by any method approved by the Commission. If a Party seeking to rebut the presumption takes appropriate action at the Commission pursuant to Section 252 of the Act and the Commission agrees that such Party has rebutted the presumption, the methodology and/or means approved by the Commission for use in determining the ratio shall be utilized by the Parties as of the date of the Commission approval and, in addition, shall be utilized to determine the appropriate true-up as described below. During the pendency of any such proceedings to rebut the presumption, the Parties will remain obligated to pay the presumptive rates ~~(the rates set forth in Section 5 for traffic below a 3:1 ratio, the rates set forth in Section 6.2.2 for traffic above the ratio)~~ subject to a true-up upon the conclusion of such proceedings. Such true-up shall be retroactive back to the date a Party first sought appropriate relief from the Commission.

6.7 For purposes of this Section 6, all Section 251(b)(5) Traffic and all ISP-Bound Traffic shall be referred to as "Billable Traffic" and will be billed in accordance with Section 15.0 below. The Party that transport and terminates more "Billable Traffic" ("Out-of-Balance Carrier") will, on a monthly basis, calculate (i) the amount of such traffic to be compensated at the FCC's interim ISP terminating compensation rate set forth in Section 6.2.2 above and (ii) the amount of such traffic subject to bill and keep in accordance with Sections 6.3, 6.4 and 6.5 above. The Out-of-Balance Carrier will invoice on a monthly basis the other Party in accordance with the provisions in this Agreement and the FCC's interim ISP terminating compensation plan.

Staff notes that this proposal incorporates the $0.0005 per minute of use rate recommended by Staff in Issue IC – 10 above.

Issue IC – 14

Both parties offer proposed language for Appendix Intercarrier Compensation Section 7.1 that would specify which classes of traffic are subject to the rates, terms, and conditions contained in this contract and which are not.

Level 3's proposed language indicates that telecommunications traffic governed by the terms, rates, and conditions contained in filed state or federal tariffs will be governed by the rates, terms, and conditions in those tariffs or by "Level 3's terms, rates and conditions."[33] It is unclear precisely what the "or" signifies in this context. Level 3 offers no explanation of when tariffs would govern as opposed to "Level 3's terms, rates and conditions." In fact, there is no explanation of what is meant by "Level 3's terms, rates and conditions." With respect to tariffs, virtually all of the telecommunications traffic referenced in the agreement can be found in either Illinois or federal tariffs. Thus, Level 3's proposal could conceivably be read to nullify almost the entire contract. Level 3's proposed Section 7.1 should, therefore, be rejected.

Alternatively, SBC's proposed language for Appendix Intercarrier Compensation Sections 7.1 goes more directly to specification of what traffic is not subject to "Section 5 and 6" of the Appendix Intercarrier Compensation. Both SBC's proposed Appendix Intercarrier Compensation sections 5.1 and 6.1 and modified versions of SBC's proposed Appendix Intercarrier Compensation sections 5.1 and 6.1 that Staff recommends the Commission adopt, make clear that Appendix Intercarrier Compensation Sections 5 and 6 apply only to Section 251(b)(5) and ISP-Bound traffic. None of the traffic classifications referenced by SBC for exclusion from the

[33] Appendix Intercarrier Compensation, Section 7.1 (emphasis added).

compensation arrangements of Appendix Intercarrier Compensation Section 5 and 6 in its proposed Appendix Intercarrier Compensation Sections 7.1 are within the bounds of 251(b)(5) and ISP-Bound traffic classifications and thus, SBC's proposal to exclude these classes is acceptable.

SBC further proposes to include language specifying that all exchange access traffic and intraLATA toll traffic will be governed by the terms and conditions of applicable federal and state tariffs. This additional provision is problematic because it could, like Level 3's proposed language, be interpreted to override any specific provisions regarding exchange access or intraLATA toll traffic that are included in the final contract. It could also indicate that the tariffs are applicable to traffic that might not otherwise be governed by such tariffs. In this instance, these problem can be resolved by simply modifying SBC's proposed language so that it indicates that tariffs will only govern to the extent that: (1) exchange access traffic and intraLATA toll traffic are not governed by specific rates, terms and conditions contained in the contract and (2) the tariffs are applicable to the exchange of the specific exchange access traffic and intraLATA toll traffic.

Staff recommends the following modified SBC language for Appendix Intercarrier Compensation, Section 7.1:

> ***The compensation arrangements set forth in Sections 5 and 6 of this Appendix are not applicable to (i) interstate or intrastate Exchange Access traffic, (ii) Information Access traffic, (iii) Exchange Services for access or (iv) any other type of traffic found to be exempt from reciprocal compensation by the FCC or the Commission, with the exception of ISP-Bound Traffic which is addressed in this Appendix. All Exchange Access traffic and IntraLATA Toll Traffic shall continue to be governed by the terms and conditions of applicable federal and state tariffs unless otherwise specified within this Agreement, but only to the***

***extent the tariffs are applicable to the exchange of the specific exchange access traffic and intraLATA toll traffic*.**

Issue IC – 15

SBC proposes to include clarifying language in Appendix Intercarrier Compensation Section 7.4 and 7.5 that would specify the proper treatment of ISP-bound traffic that is for example provided under FX-like or through traditional LEC-IXC-LEC arrangements. This would clarify, for example, that when an SBC customer places a call to an ISP both located outside the callers local calling and with a telephone number outside the local calling area that any intermediate carrier performing what is essentially long distance transport would not be eligible for reciprocal compensation at the rate specified in Appendix Intercarrier Compensation Sections 5 and 6, but would rather be responsible for switched access charges. This clarifying language is consistent with the treatment Staff recommends for the various types of ISP-bound traffic and adds clarity to the contract. Therefore, the Commission should adopt SBC's proposed language in Appendix Intercarrier Compensation Sections 7.4 and 7.5.

Issue ITR – 1

The Appendix ITR "sets forth the terms and conditions for Interconnection" between SBC and Level 3. Appendix ITR, Section 1.1.

Appendix ITR, Section 1.2 summarizes the classes of traffic that are governed by the Appendix ITR. The parties disagree as to what traffic is governed by the Appendix ITR and therefore offer competing proposals for Appendix ITR, Section 1.2. Appendix ITR, Section 1.2.

According to the language proposed by Level 3, the Appendix ITR specifies the terms and conditions for interconnection for all "Telecommunications Traffic." Appendix ITR, Section 1.2. According to the language proposed by SBC, the Appendix ITR specifies the terms and conditions for the interconnection of "Section 251(b)(5), ISP-bound, IntraLATA toll, InterLATA 'meet point', mass calling, E911, Operator Services, and Directory Assistance traffic." It is Staff's understanding that the parties' disputes center around two types of traffic: (1) non-meet point InterLATA toll traffic (including PSTN-IP-PSTN VoIP and (2) IP-PSTN VoIP traffic.

SBC proposes to prohibit Level 3 from sending interLATA toll traffic over local interconnection trunk groups – a proposal that Level 3 opposes. Appendix ITR, Section 12. The benefits from combining both interLATA toll traffic with other traffic carried on local interconnection trunk groups include reductions in the number of interconnection facilities the companies need to deploy and reductions in the number of tandem ports used. InterLATA toll traffic is subject to switched access charges, while traffic such as 251(b)(5) traffic is subject to reciprocal compensation rates. 47 U.S.C. §251(b)(5); 47 C.F.R. §§51.701, *et seq*., 69.5. Therefore, the costs of combining such traffic over common local trunk groups include the costs of measuring such traffic and the costs associated with inaccurately measuring and billing such traffic.

The benefits, in terms of facilities cost savings, will depend on the size of any reduction in interconnection facilities needed when traffic is combined over common trunk groups. Tandem switch exhaust will also be dependent on the number of interconnection facilities that are used to exchange traffic. Tr. 244-245. While the parties

theorize regarding why reductions *might* occur, they have not come forward with evidence in this proceeding regarding the specific size of such reductions if any.

Based on current traffic patterns Level 3's Mr. Wilson estimates that Level 3 would need to add between 10 and 20 percent more capacity to its network "in order to handle the feature group D One-Plus traffic that [Level 3] needs to complete at SBC." Tr. 247. However, this estimate does not appear accurate.

Mr. Hunt asserts that Level 3 does not exchange interLATA toll traffic directly with SBC. Tr. 141. This is consistent with Mr. McPhee's statement that "SBC Illinois has not billed Level 3 for any switched access local switching charges since January, 2003." SBC Ex. 7.1 at 3. If Level 3 does not currently exchange any interLATA traffic with SBC, then Level 3 will presumably need no additional facilities to exchange such traffic with SBC, and Mr. Wilson's estimate is therefore in error.

Alternatively, it appears that Level 3 does pass interLATA toll traffic to SBC, albiet indirectly through third party vendors. Tr. 141, 247. Thus, it may be the case that Mr. Wilson's estimate is based on the number of additional facilities that Level 3 would need to deploy in order to move traffic from third party networks onto its own network. However, if this is the case, then Mr. Wilson's estimate fails to identify the reduction in facilities that would result solely from Level 3's proposal to pass interLATA traffic over local interconnection trunk groups.

Likewise, it is possible that Mr. Wilson's estimates regarding additional facilities are correct. For example, Level 3 may indeed exchange interLATA toll traffic with SBC, contrary to Mr. Hunt's assertion. If this were the case, Level 3 would normally purchases Feature Group D trunks for the exchange of interLATA toll traffic. Tr. 138.

However, Level 3 asserts that it currently purchases no Feature Group D trunks for exchanging interLATA toll traffic. Tr. 141, 247. This, coupled with Mr. McPhee's statement that SBC Illinois has not billed Level 3 for any switched access local switching charges since January, 2003, indicates that Level 3 is sending interLATA toll traffic over local interconnection trunks and is not being billed appropriate switched access charges for this interLATA toll traffic. While under this scenario Mr. Wilson's estimate may be accurate, it would suggest that Level 3 is failing to pay significant switched access charges that are due SBC.

SBC failed to provide any information regarding the reduction in facilities that would result from Level 3's proposal to pass interLATA toll traffic over local interconnection trunk groups. SBC witness Carl Albright testified regarding current "meet point" interLATA toll traffic patterns; however, this traffic is, as Staff sees it, a different class of traffic than non-meet point interLATA toll traffic. That is, meet point traffic is interLATA traffic passed by an IXC to SBC and Level 3 for joint termination while non-meet point traffic is interLATA traffic passed by Level 3 (acting in its capacity as an IXC) to SBC for termination. Tr. 646-47. Level 3 has indicated that it "may" establish interconnection trunk groups separate and apart from its local interconnection trunk groups with respect to meet point interLATA toll traffic, but Level 3 has made no such agreement with respect to non-meet point interLATA toll traffic. Appendix ITR, Section 3.3.

Therefore, to the extent the parties' disagreement turns on non-meet point interLATA traffic only, SBC has offered no testimony that would permit Staff to quantify

the reduction in facilities that might occur from Level 3's proposal to pass non-meet point interLATA traffic over local interconnection facilities.

Similarly, there is little evidence tending to quantify the costs associated with incorrectly measuring and billing traffic. Based on his experience, Mr. Wilson suggests the error may be small. Tr. 250. However, Mr. Wilson's estimate is based on the lack of disputes in the past. Id. Past behavior is of questionable relevance, however, given the recent public controversies over billing noted by Mr. Albright. SBC Ex. 1.0 (Albright) at 36. That is, the recent controversies cited by Mr. Albright suggest that carriers only recently have begun to discover discrepancies in traffic billing and measurement that have been overlooked in the past. Furthermore, there is little to no evidence that would quantify the costs of establishing and maintaining a system to accurately measure and bill jurisdictionally diverse traffic passed over common trunk groups.

In sum, the parties have provided little in the way of quantifiable evidence regarding the costs and benefits of passing intraLATA toll traffic over common trunk groups. There is, however, some limited evidence to suggest that neither the costs of establishing separate trunk groups, nor the costs of measuring and billing jurisdictionally diverse traffic passed over common trunk groups, is particularly significant. First, according to Mr. Albright, Level 3 currently has substantial excess trunk capacity.[34] SBC Ex. 1.1 (Albright) at 8. To the extent that Level 3 in fact has such excess capacity, this is inconsistent with Level 3's arguments regarding the significance of costs that excess capacity causes, both directly - through investment costs, and indirectly - through costs associated with tandem exhaust. Second, Staff's support for and theCommission's past

[34] SBC Illinois Ex. 1.1 at 8.

determinations to accept SBC's proposal to separate intercarrier compensation rating structures relied on SBC's assertions that measurement of such traffic through usage factor proxies was a reasonable exercise.[35] This suggests then that percentage usage factors can be relied on without imposing excessive costs on the parties, as Mr. Wilson suggests.

Thus, based upon the available evidence, neither maintaining separate trunk groups for jurisdictionally diverse traffic, nor combining such traffic over common trunk groups, appears to be an unduly burdensome outcome. Thus, the Commission can adopt either party's proposal. Nevertheless, it is Staff's recommendation that the Commission adopt SBC's proposal, which would require Level 3 to do, what Mr. Hunt states it normally would do in any case, and pass interLATA toll traffic over feature group D trunk groups rather than over local interconnection trunk groups.

The Commission has denied, based on an incomplete proposal, at least one other carrier the ability to combine such traffic over common trunks.[36] Staff Ex. 1.0 (Zolnierek) at 18. Level 3 has certainly failed to provide evidence for the Commission to alter that decision here. In addition, with no evidence that either proposal is unduly burdensome on the parties, SBC's proposal, which will prevent misidentification of traffic, is to be favored. It is for these reasons that the Commission should accept SBC's position on this issue.

Going forward a more significant issue may be the appropriate routing of IP-PSTN VoIP traffic. However, as Staff has argued above, the Commission should not decide this issue because the parties already have taken actions that would require the

[35] Order in Docket 03-0329 at 124.

[36] Staff Ex. 1.0 at 18.

FCC to decide it and because the FCC has stated "that [it, the FCC], not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to IP-enabled services."[37].

For these reasons Staff recommends the Commission accept SBC's proposed language for Appendix ITR Section 1.2 which would have the effect of limiting the scope of this contract by excluding from the contract rates, terms, and conditions for interLATA toll traffic and IP-PSTN VoIP traffic.

Issue ITR – 2

SBC proposes to exchange traffic with Level 3 over local interconnection groups only when the traffic is exchanged between SBC and Level 3's end users.[38] Appendix ITR, Section 3.3. SBC's position appears to be that this language is intended to prevent Level 3 from passing third party IXC traffic over local interconnection trunk groups. Level 3 – SBC 13State – DPL – ITR – Issue No. ITR 2. Level 3 objects to SBC's proposal on the grounds that SBC's proposal would prevent both Level 3 and SBC from transiting traffic. Id.

Staff recommends the Commission reject SBC's proposal to include the phrase "for the exchange of traffic between each Party's End Users only" in the first and second paragraph of Appendix ITR, Section 3.3. Nothing prohibits Level 3 from providing wholesale local exchange or exchange access services. SBC has proposed restrictions on the use of common trunk groups that would, if accepted - as Staff recommends - prevent Level 3 from passing interLATA toll traffic (whether transited or not) over local

[37] FCC Press Release entitled "FCC FINDS THAT VONAGE NOT SUBJECT TO PATCHWORK OF STATE REGULATIONS GOVERNING TELEPHONE COMPANIES", Released November 9, 2004, at 1.

[38] Appendix ITR Section 3.3.

interconnection trunks, thereby obviating SBC's asserted concerns in this regard. Adding SBC's additional "end user" restriction is therefore unnecessary to prevent Level 3 from passing interLATA toll traffic (or other prohibited forms of traffic) over local interconnection trunks. Thus, SBC's proposed language is redundant at best.

More problematic is the fact that SBC's language might well prevent Level 3 from passing *permissible* traffic -- such as Section 251(b)(5) traffic -- over local interconnection trunks when Level 3 acts as a transiting provider or as a wholesale provider for another retail provider. In addition, this language appears to preclude the exchange of all meet point traffic, which as Staff understands it, is defined as traffic passed from third party IXC providers. Tr. 646-47. In fact, because Level 3 has no end users, Tr. 150, SBC's proposal appears to require Level 3 to cease exchanging traffic with SBC entirely. Thus, SBC's proposal should be rejected.

Issues ITR – 5, 6, 7, 8 & 9

These disputes center on whether SBC must provide transit service to Level 3 under this agreement. The parties agree that SBC is not specifically required to provide transit service according to FCC rules. Level 3 Ex. 1.0 (Hunt) at 53; Level 3 – SBC 13State – DPL – ITR, Issue ITR – 6. Nevertheless, Level 3 proposes to include transiting service within the agreement citing as support policy considerations that arise when SBC fails to provide transiting service. Level 3 Ex. 1.0 (Hunt) at 55-56.

Potential public policy concerns that might result from SBC's failure to provide transit service are essentially irrelevant, inasmuch as SBC makes such service available. SBC has a currently effective transit offering in its Illinois tariffs. Staff EX. 1.0 (Zolnierek) at 22. Level 3 therefore can obtain transit service through SBC's Illinois

tariffs, despite the fact that FCC rules do not specifically require SBC to provide such service.

For the reasons above, Staff recommends the Commission reject Level 3's proposal to include transit service rates, terms, and conditions within the agreement. That is, Staff recommends the Commission reject Level 3's proposed Appendix ITR, Section 4.3 language including subsections 4.3.1, 4.3.2, 4.3.3, and 4.3.4.

Issue ITR – 12(a)

Like issue ITR – 1, Issue ITR - 12 turns on whether Level 3 may or may not combine all classes of traffic on local interconnection trunks. Level 3 – SBC 13State – DPL - ITR, Issue ITR 12. For the reasons identified with respect to Issue ITR – 1 above, Staff recommends that Level 3's proposal to combine interLATA and intraLATA traffic over common trunk groups be rejected. The Commission should accept SBC's proposed language and reject Level 3's language for Appendix ITR, Section 5.3.3.1.

Issues ITR 18 and 19

The primary disputes with respect to Issues 18 and 19 are identical, with one exception, to the issues disputed in Issue IC 2. Level 3 – SBC 13State – DPL - ITR, Issues ITR 18 and 19. In particular, as it does with respect to Issue IC 2, SBC proposes to embed IP-enabled traffic within the definitions of classes of traffic depending on the geographic location of the calling and called parties for such traffic and to further specify the trunking arrangement over which switched access traffic will be exchanged. Level 3 – SBC 13State – DPL - ITR, Issues ITR 18. Alternatively, Level 3 proposes to simply to the define circuit switched and IP traffic, respectively, by cross referencing to its

proposed definitions in the Appendix IC. Level 3 – SBC 13State – DPL - ITR, Issues ITR 18 and 19. Apart from Level 3's concerns with interappendix consistency this issue is identical to Issue IC –2.

As an initial matter the Commission should not, for the reasons articulated in Issue IC – 2 above, determine rates, terms, and conditions for the exchange of IP-enabled traffic. Therefore, the Commission should reject all disputed language that would specify rates, terms, and conditions for IP-enabled traffic including Level 3's cross reference to its proposed definition of circuit switched traffic (which merely serves as a complement to its proposed definition of IP traffic). To implement this recommendation, the Commission should, as it should for Issue IC 2 above, accept SBC's language for Appendix ITR Sections 12.1 and 12.2, but should require the parties to revise this language to specifically indicate that it does not apply to IP-PSTN "VoIP" traffic.

With respect to the consistency concerns identified by Level 3, Staff concurs with the general notion inherent in Level 3's proposal that traffic should be defined consistently between sections. Level 3 – SBC 13State – DPL - ITR, Issues ITR 18 and 19. However, SBC's Appendix ITR Sections 12.1 and 12.2 appear to match word for word SBC's Appendix IC Sections 16.1 and 16.2. Therefore, adopting Staff's recommendation will not result in inconsistency between these sections.

Issue UNE – 1

The parties offer competing proposals for the Appendix UNE aimed at implementing the FCC's Interim UNE Order. Unfortunately, the fashion in which the parties bring this dispute before the Commission places the Commission in a difficult position. The parties bring competing proposals to the Commission that would result in

numerous different UNE rates, terms, and conditions. Nevertheless, the parties do not frame the dispute in terms of such differences. Rather, the parties ask the Commission to make an all or nothing decision. However, determining which proposal is the most appropriate requires the Commission to determine, among other things, which parties resulting UNE rates, terms, and conditions best meet the requirements of Section 251 of the Act.

Of the two proposals, Level 3's is the most clear with respect to implementation. Level 3 proposes to incorporate the UNE appendix from the parties existing agreement into the new agreement. Level 3 – SBC 13State – DPL – UNE, Issue No. UNE 1. Level 3 proposes that the parties abide by the rates, terms, and conditions of the existing contract until the FCC releases permanent UNE rules. Id. Level 3's proposal, while easily understood, is inconsistent with the FCC's *Interim UNE Order*.

The D.C. Circuit Court vacated the FCC's impairment determinations with respect mass market switching, enterprise market loops and dedicated transport.[39] United States Telecom Association v. Federal Communications Commission, 359 F.3d 554, 594-595, 2004 U.S. App. Lexis© 3960 (D.C. Cir. 2004) ("USTA II"). Furthermore, the FCC has conditioned SBC's requirement to provide certain other UNEs on its requirement to unbundle local switching UNE Interim Order, ¶4. These elements include CNAM databases and/or information, LIDB databases and/or information, toll free databases and/or information, SS7 systems, shared transport, and Operator Services

[39] Staff notes that there is some ambiguity with respect to the USTA II determinations with respect to enterprise loops. Interim UNE Order at ¶1, n. 4. However, the FCC has indicated that it assumed arguendo for the purposes of its Interim UNE Order that the D.C. Circuit vacated the Commission's enterprise market loop unbundling rules. Interim UNE Order at ¶1, n. 4. Staff also notes that impairment findings with respect to OCn level loops and transport were not vacated by USTA II. USTA II at 108-109.

and Directory Assistance (OS/DA).[40] The FCC has specified that each of these elements must be made available only when unbundled local switching is made available.[41] Therefore, the FCC rules do not currently require SBC to provide these elements as Section 251 UNEs.

Despite the fact that the FCC does not have currently effective rules with respect to these UNEs, SBC is obligated by the FCC's Interim UNE Order to provide these UNEs to Level 3 as it did under an effective interconnection agreement or state tariff on June 15, 2004.[42] That is, the FCC, while not freezing any specific rules regarding these UNEs, has frozen the rates, terms, and conditions under which they were offered to Level 3 by SBC. The FCC did not, however, freeze the rates, terms, and conditions under which all UNEs must be provided. For example, neither the FCC rules nor the FCC's Interim UNE Order currently require SBC to provide UNE enterprise switching.[43]

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[40] 47 C.F.R. § 51.319(d)(4)(i) and 47 C.F.R. § 51.319(d)(4)(ii).

[41] With respect to CNAM, LIDB and toll free databases and/or information see TRO, ¶¶549, 551. With respect to SS7 systems see FCC Interim TRO, ¶544. With respect to shared transport, see TRO, ¶ 534. With respect to Operator Services and Directory Assistance see TRO, ¶560. I note that the FCC has determined that SBC must provide OS/DA with switching only if SBC does not provide the customized routing necessary to use alternate providers. TRO, ¶560.

[42] Specifically, the FCC's Interim UNE Order requires: "Until the earlier of (1) six months after Federal Register publication of this Order or (2) the effective date of the final unbundling rules adopted by the Commission in the proceeding opened by the appended Notice, the interim approach described above will govern. Incumbent LECs shall continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004. These rates, terms, and conditions shall remain in place during the interim period, except to the extent that they are or have been superseded by (1) voluntarily negotiated agreements, (2) an intervening Commission order affecting specific unbundling obligations (e.g., an order addressing a pending petition for reconsideration), or (3) (with respect to rates only) a state public utility commission order raising the rates for network elements." Interim UNE Order at ¶ 29. "Throughout this Notice and Order, references to an incumbent LEC's obligations under its interconnection agreements apply also to obligations set forth in the incumbent LEC's applicable statements of generally available terms (SGATs) and relevant state tariffs." Interim UNE Order at ¶ 1, n. 5.

[43] 47 C.F.R. § 51.319(d)(3).

The interim freeze on the parties' contract rates, terms, and conditions is finite in duration. That is, it terminates: (1) six months from September 13, 2004 (the effective date of the Interim UNE Order), or (2) when the FCC adopts superceding rules, whichever date is earlier. The FCC established directives for a second sixth month period following the interim freeze, which it has termed a "transition period." Interim UNE Order, ¶29. The Commission, in another arbitration, ordered SBC to incorporate the terms of this transition period into its contract.[44] XO Arbitration Decision at 95-96. However, subsequent to the Commission's determination, the FCC stated that its "transition period" directives do not constitute final agency action, have no legal force whatsoever, and instead represent a proposal that the agency may or may not adopt when it is issues its final rules. FCC Opposition of Respondents to Petition for Writ of Mandamus, In the United States Court of Appeals for the District of Columbia Circuit, No. 00-1012 (and consolidated cases), September 16, 2004, at 8, n. 2.

While this statement was, perhaps, based in the exigencies of litigation, this Commission ignores it at its peril, and might be well advised to assume there is no currently effective federal Section 251 obligation for SBC to provide the UNEs referenced in the *Interim UNE Order* beyond six months from September 13, 2004.

Therefore, Level 3's proposal is inconsistent with the FCC's Interim UNE Order in two respects. First, Level 3 would freeze its existing UNE contract rates, terms, and conditions for all UNEs, rather than the specific subset of UNEs identified for such a freeze by the FCC. Second, it would freeze these rates, terms, and condition indefinitely, rather than for the 6-month period specified by the FCC.

[44] Order in Docket No. 04-0371 at 95-96.

Alternatively, SBC proposes to carry forward selected provisions from the existing contract by way of a "rider" during the 6-month interim period established by the FCC. Level 3 – SBC 13State – DPL – UNE, Issue No. UNE 1. Following this interim period SBC proposes a replacement UNE appendix that would, among other things, remove certain unbundling requirements. Id. It is unclear how SBC's proposal could be implemented.

SBC opposes incorporation of the existing contract rates, terms, and conditions into the new agreement. Id. However, SBC's proposed rider requires, by its terms, attachment to the agreement in effect on June 15, 2004. See SBC Ex. 8.0 (Silver) Attachment B at 1 ("WHEREAS, as of the date the parties executed the Agreement to which this Temporary Rider is attached, the Interim Order was still in effect, and its interim time period(s) had not yet expired[.]") Furthermore, even if the rider did not require attachment to an existing agreement, it would not, standing alone, provide for UNEs, such as 2-wire analog loops, that SBC remains required to provide under FCC rules.

Therefore, while Level 3's proposal might require SBC to provide UNEs that are unaffected by the freeze, and which the FCC rules no longer require SBC to provide, SBC's proposal would relieve SBC from providing UNEs that are unaffected by the freeze and which the FCC rules require SBC to continue providing.

SBC further proposes that the Commission require the parties to adopt its proposed Appendix UNE following the expiration of the FCC's interim 6-month freeze period. SBC's proposed Appendix UNE contains numerous disputed issues that the

parties have presumably agreed not to request the Commission to resolve and more importantly that SBC has failed to support. See Appendix UNE (SBC UNE Appendix).

Thus, it is apparent that neither party has offered an acceptable proposal to the Commission. Accordingly, Staff recommends the Commission: order the parties to include within their contract, on an interim basis, the Appendix UNE from the agreement in effect between the parties on June 15, 2004. The Commission should further order the parties to append to their agreement the rider proposed by SBC, which comports the previous contract to the terms, and conditions of the FCC's interim freeze.

With respect to the period following the FCC's interim freeze, the Commission should order the parties to jointly develop an Appendix UNE that incorporates existing federal and state rules and regulations as they currently apply to the period following expiration of the FCC's interim freeze period. The Commission should require the parties to complete this exercise within 45 calendar days of the adoption of the Commission's arbitration decision in this proceeding. The Commission should also require the parties, to the extent they cannot agree on rates, terms, and conditions for the Appendix UNE developed for implementation following the FCC's interim freeze period, to present the Commission, again within 45 calendar days, with properly framed issues regarding any disputes for Commission resolution.[45]

CONCLUSION

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

[45] Staff notes that the 45-day time frame it proposes takes into account the fact that the parties identified numerous disputed issues with respect to their respective proposed Appendix UNEs and ultimately determined to withhold the product of their efforts in this proceeding.

Respectfully submitted,

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